No. 92-1550

# In the Supreme Court of the United States

OCTOBER TERM, 1993

ABF FREIGHT SYSTEM, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND TRUCKING MANAGEMENT, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

*Of Counsel:*
STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

E. CARL UEHLEIN, JR.*
JOSEPH E. SANTUCCI, JR.
JOHN F. RING
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
* *Counsel of Record for Amici Curiae*

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### INTEREST OF THE *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America (the "Chamber") is a federation consisting of approximately 215,000 companies and several thousand other organizations such as state and local Chambers of Commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States, and the single largest association of employers in the

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[1] This brief is filed with the written consent of all parties as provided in Rule 37.3 of the Rules of the Supreme Court of the United States. Copies of those consents are on file with the Clerk of the Court.

country. A significant aspect of the Chamber's activities involves the representation of the interests of its members in employment and labor relations matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations cases coming before the Court.[2]

Trucking Management, Inc. ("TMI") is a multi-employer association which serves as the collective bargaining agent for most of the unionized motor carrier industry in its dealings with the International Brotherhood of Teamsters. Petitioner, ABF Freight System, Inc. ("ABF"), is a long standing member. TMI's 26 members include some of the largest as well as some of the smallest companies in the trucking industry, employing from five to as many as 20,000 employees. TMI's exclusive function is to negotiate and administer the National Master Freight Agreement and its supplemental agreements ("NMFA"), that govern the terms and conditions of employment for approximately 200,000 Teamster-represented employees. The NMFA governed the employment of Michael Manso, the individual whose discharge was the subject of the underlying National Labor Relations Board (the "NLRB" or "Board") proceeding.

The Chamber and TMI have a significant and immediate concern with the propriety of the Board's reinstatement order and the decision of the Court of

[2] *E.g., District of Columbia v. Greater Washington Board of Trade,* —— U.S. ——, 113 S. Ct. 580 (1992); *Lechmere v. N.L.R.B.,* —— U.S. ——, 112 S. Ct. 841 (1992).



Appeals to enforce the order. *Miera v. N.L.R.B.*, 982 F.2d 441 (10th Cir. 1992). The Tenth Circuit and the Board apparently believe that it furthers the purposes and policies of the National Labor Relations Act (the "Act" or "NLRA") to order reinstatement even in egregious cases like this one where the employee lied first to his employer, then to a grievance committee, and finally under oath to an administrative law judge. As the representatives of employers throughout the country, the *Amici* strongly disagree with that position.

Therefore, the Chamber and TMI file this brief in support of the Petitioner in order to assist the Court in its consideration of the issues in this case.

## STATEMENT OF THE CASE

Michael Manso was employed as a casual dock worker at ABF's Albuquerque, New Mexico terminal from April, 1987 until his discharge in August, 1989. During his employment, he was a member of Teamsters Local Union No. 492, and worked under the terms of the NMFA and the NMFA's Western States Area Supplement.

Manso was discharged twice by ABF in 1989. The first time, he was terminated for not being available when called to work, as is required under the NMFA. He was reinstated without backpay after filing a grievance and successfully persuading a joint grievance committee that his failure to respond to ABF's telephone call was the result of a malfunctioning phone. Not long after being reinstated, Manso was discharged again on August 17, 1989, this time for recurring tardiness. When questioned by his super-

visors about the reason for his tardiness, Manso claimed to have had car trouble. He told his employer that he had been assisted by an officer of the local sheriff's department, who Manso identified by name. ABF investigated the incident, and concluded from the police that Manso's story was not legitimate. He then was discharged.

Manso filed another grievance under the NMFA, but ABF presented compelling evidence to the joint grievance committee that Manso had lied about the reason for his tardiness. Manso then filed an unfair labor practice charge with the NLRB. During the Board hearing, Manso repeated his story, this time under oath before an administrative law judge, about his car trouble on the way to work the morning of his discharge. He also testified about being assisted by the police. At the hearing, however, ABF produced the police officer Manso claimed had assisted him. The officer testified that he had stopped Manso for speeding on August 17 at a time long after he should have been at work, and said that there was nothing wrong with Manso's car. In light of the officer's testimony, the NLRB judge refused to reinstate Manso because he had lied to his employer and in his testimony to the Board. The judge stated unequivocally in his written decision: "Manso was lying." On review, however, the NLRB set aside this aspect of the judge's decision, concluding that ABF had violated Sections 8(a)(3) and (4) of the NLRA, 29 U.S.C. §§ 158(a)(3) and (4) (1988), by discharging Manso, and ordered him reinstated with back pay. The Tenth Circuit Court of Appeals enforced the Board's order.



## SUMMARY OF ARGUMENT

The NLRB has authority to grant or deny reinstatement in order to remedy unfair labor practices by employers where doing so will "effectuate the policies" of the Act. 29 U.S.C. § 160(c) (1988). Although reinstatement with backpay has been a traditional make-whole remedy, it is well established that certain employee misconduct will forfeit an employee's right to reinstatement. The facts in this case present the Court with the relatively narrow issue regarding the propriety of reinstatement where an employee engages in egregious and dishonest misconduct. The Chamber and TMI believe that an employee, like Manso, whose pattern of dishonesty includes deliberately lying under oath to an NLRB judge, proves himself so untrustworthy that an employer should not be required to accept his reinstatement.

Employers must—above all else—be able to trust their employees and must be able to refuse to employ those individuals whose honesty and integrity cannot be trusted. Employers place their property, goodwill, customers, indeed the very future of their business, in the hands of their employees every day. An employee whose untruthful testimony concerning his employment relationship prompts a neutral factfinder to unequivocally declare that the employee has lied under oath in a federal proceeding should not be eligible for reinstatement. If the Court adopts the position that employers are required to take back employees who engage in this degree of dishonesty, it will substantially weaken the fundamental underpinnings of the employer-employee relationship and severely undermine this country's labor policy.

Most circuits have recognized that the purposes of the Act are not served by requiring an employer to reinstate an untrustworthy employee. Specifically, the Eighth Circuit's recent decision in *Precision Window Mfg., Inc. v. N.L.R.B.*, 963 F.2d 1105 (8th Cir. 1992), strikes the proper balance between protecting employees' rights under the Act and avoiding the untenable situation created by reinstating a dishonest employee. The court in that case appropriately held that employees forfeit their right to a reinstatement remedy when they testify untruthfully during an NLRB hearing.

Although this Court affords the NLRB considerable discretion in determining whether to reinstate employees, the Board's decision to order reinstatement in this case was arbitrary and without any reasonable basis. The Board's reinstatement order ignores the deleterious effect that lying to an NLRB judge, like other types of employee dishonesty, has on the employment relationship and the Board's processes. Additionally, the Board's current position improperly conveys the message that lying and dishonesty are permissible. This result is especially unnecessary given the alternative remedies that the Board has available to cure statutory violations.



## ARGUMENT

### I. REINSTATEMENT OF AN EMPLOYEE WHO INTENTIONALLY AND DEMONSTRABLY LIES TO THE NLRB DOES NOT EFFECTUATE THE POLICIES OF THE NLRA

The Act sets forth a comprehensive regulatory framework which governs the relationship between employers, employees and labor organizations covered by the Act. 29 U.S.C. § 151 *et seq.* (1988). As part of this framework, employers are prohibited under Sections 8(a)(3) and (4) of the Act from discriminating against employees because of their union activities, or for filing unfair labor practice charges or giving testimony in an NLRB proceeding. 29 U.S.C. §§ 158(a)(3) and (4). To ensure compliance with the Act, Congress, in Section 10(c), granted the NLRB authority to issue cease and desist orders, "and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . .," which includes promoting labor harmony and stability in the workplace. 29 U.S.C. § 160(c).

Although reinstatement with backpay has been the traditional make-whole remedy for employees who have been discriminated against, it is equally well established that certain misconduct causes the forfeiture of that remedy. *See N.L.R.B. v. Local 1229, I.B.E.W.*, 346 U.S. 464 (1953); *Precision Window Mfg., Inc.*, 963 F.2d 1105 (8th Cir. 1992); *N.L.R.B. v. Commonwealth Foods, Inc.*, 506 F.2d 1065 (4th Cir. 1974).

This case presents the important question of whether it "effectuate[s] the policies" of the NLRA to reinstate an employee, like Manso, whose egregious

behavior includes intentionally and demonstrably lying under oath to a judge during an NLRB hearing. Indeed, the facts of this case present the Court with an unusual situation at the most egregious end of the spectrum. Here, after lying to his employer and to the grievance committee, Manso purposefully lied to an NLRB judge and, based on the uncontroverted evidence presented at the hearing, the judge concluded that Manso had lied. This is not a case of disputed credibility or questionable testimony. *See, e.g., Service Garage, Inc.*, 256 N.L.R.B. 931, 935 (1981), *enforcement denied on other grounds*, 668 F.2d 247 (6th Cir. 1982). Nor is this a case where the employee's dishonesty involved an insignificant or immaterial fact, or where the employer provoked the employee's misconduct. *See, e.g., N.L.R.B. v. Vought Corp.*, 788 F.2d 1378, 1384 (8th Cir. 1986). This case involves an employee whose intentional dishonesty about a material issue in the case prompted an NLRB judge to take the unusual step of unequivocally declaring: "Manso was lying." *ABF Freight System, Inc.*, 304 N.L.R.B. 585, 600 (1991). The Chamber and TMI submit that such conduct so undermines the essential trust forming the foundation of the employment relationship that reinstatement is made untenable.

In this case, we are "not dealing with mere abstract rights, but with an employment relationship." *N.L.R.B. v. Coca-Cola Bottling Co.*, 333 F.2d 181, 185 (7th Cir. 1964). Trustworthiness, honesty, and loyalty are the underpinnings of that relationship. No employer should be required to operate his business, particularly in this day and age of increased international competition, preoccupied with lingering



questions about the trustworthiness of its employees. As this Court has previously pointed out, "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer." *N.L.R.B. v. Local 1229, I.B.E.W.*, 346 U.S. at 472.

The *Amici* are not advocating "pollyanna standards for the conduct of workingmen but merely those that are not incompatible with the normal employee-employer relationship." *National Furniture Mfg. Co.*, 134 N.L.R.B. 834, 859 (1961) (trial examiner's decision not adopted by the NLRB), *enforcement denied in relevant part*, 315 F.2d 280 (7th Cir. 1963). Indeed, unlike the NLRB and the Tenth Circuit, most other circuits understand that the standards of employee conduct do not permit intentional lying, and thus have refused to enforce Board orders that require reinstatement of employees who testify untruthfully.

In *Iowa Beef Packers, Inc. v. N.L.R.B.*, 331 F.2d 176, 185 (8th Cir. 1964), for example, a Board trial examiner found an employer in violation of Section 8(a)(4) of the Act, 29 U.S.C. § 158(a)(4), but nevertheless refused to order reinstatement of the employee because he had testified falsely at the administrative hearing. Despite the employee's lying, the NLRB overruled the trial examiner and ordered the employee returned to work. In the Board's view, the employee's conduct was not "deliberate and malicious" enough to warrant forfeiture of the reinstatement remedy. *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 622-623 (1963). The Eighth Circuit denied enforcement of the Board's reinstatement order, concluding that because the employee gave false testimony at the hearing, "forfeiture of [his reinstate-

ment] remedy [was] required to serve the policy of the Act . . . ." 331 F.2d at 185. *See also Alumbaugh Coal Corp. v. N.L.R.B.*, 635 F.2d 1380, 1386 (8th Cir. 1980) (policies of NLRA are not served by granting reinstatement to "an employee whose dishonesty has been established and whose untruthful testimony abused the process he now claims should grant him full relief.").

Other courts of appeals similarly have acknowledged that requiring reinstatement of an employee who cannot be trusted gives rise to an incongruous and unworkable situation. The Fifth Circuit, for example, concluded that reinstating untrustworthy employees only serves as "an *invitation* to continue such misconduct on the part of the reinstated employees as well as others." *N.L.R.B. v. Big Three Welding Equipment Co.*, 359 F.2d 77, 84 (5th Cir. 1966). In the court's view, the reinstatement of employees who engage in misconduct necessarily results in serious tension and ill will between the employer and the employee. *Id.* The Ninth Circuit likewise has unequivocally stated that reinstating an employee who lies on the witness stand does not effectuate the policies of the NLRA.[3] *N.L.R.B. v. Magnusen*, 523

[3] Arbitrators, who are charged with applying the "law of the shop," similarly have had little difficulty appreciating the harm visited upon both the process and the employer by requiring the reinstatement of a dishonest employee. *See, e.g., Michigan Department of Corrections*, 97 Lab. Arb. (BNA) 286, 290 (Knott, 1991) ("Deliberate falsification goes to the heart of the employment relationship because dishonesty establishes that relationship on a false premise."); *Washington Metropolitan Area Transit Authority*, 84 Lab. Arb. (BNA) 292, 295 (Tharp, 1985) ("There can be no question that lying under oath or lying to an employer certainly involves moral turpitude."). Given arbitrators unique understanding of the



F.2d 643 (9th Cir. 1975). *See also Oil, Chemical & Atomic Workers Int'l Union v. N.L.R.B.*, 547 F.2d 575, 593 n.19 (D.C. Cir. 1976) (employer "should not be forced to live with hostile employees" who attempted to manufacture evidence against it); *N.L.R.B. v. Coca-Cola Bottling Co.*, 333 F.2d at 185 ("to force [the employee] upon the Company under such circumstances would bring about an impossible situation"); *N.L.R.B. v. National Furniture Mfg. Co.*, 315 F.2d 280, 287 n.7 (7th Cir. 1963) ("difficult for us to judicially enforce a renewal of a relationship that bids ill for all concerned."). *Cf. N.L.R.B. v. Apico Inns of California, Inc.*, 512 F.2d 1171, 1176 (9th Cir. 1975).

The Chamber and TMI submit that the recent decision of the Eighth Circuit in *Precision Window Mfg., Inc. v. N.L.R.B.*, 963 F.2d 1105, strikes the appropriate balance between protecting employees' rights under the Act and avoiding the untenable situation of requiring employers to reinstate individuals they cannot trust. In *Precision Window*, the court refused to enforce a Board order reinstating an employee who initially testified dishonestly before an administrative law judge, but who subsequently was "hammered into telling the truth." *Id.* at 1110. The court held:

> This court refuses to take the Board's processes as lightly as the Board apparently does. An employee may sacrifice his right to reinstatement by engaging in dishonest or fraudulent activity following his termination. *Alumbaugh Coal*

workplace, courts traditionally have afforded great deference to their decisions. *See United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987).

> *Corp. v. N.L.R.B.*, 635 F.2d at 1386. '[T]he purposes and policies of the Act do not justify full reinstatement of an employee whose dishonesty has been established and whose untruthful testimony abused the process he now claims should grant him full relief.' *Id. Specifically, an employee forfeits his reinstatement remedy when he purposefully testifies falsely during an administrative hearing.*

*Id.* (citations omitted and emphasis added).

Significantly, the Tenth Circuit attempted to distinguish the decision in *Precision Window*, pointing out that Manso initially lied not to the judge, but to his employer, and lied only about facts that were not relevant to his termination. *Miera v. N.L.R.B.*, 982 F.2d at 447. This analysis fails. Surely, the Tenth Circuit is not saying that lying to a judge is permissible so long as the employee lies to his employer first. Furthermore, to the extent the court's view is that reinstatement should be denied only when the employee's untruthfulness is "highly relevant to determining" the unfair labor practice charge, that position must be rejected.[4] *Precision Window Mfg.*,

[4] The Tenth Circuit completely ignores the fact that Manso also lied in his testimony before the judge, the very conduct which prompted the Eighth Circuit to deny reinstatement in *Precision Window Mfg., Inc.*, 963 F.2d at 1110. Additionally, Manso's false testimony was not only relevant to determining the basis for his discharge, it provided the foundation for the judge's conclusion that his discharge did not violate the Act: "Accordingly, I must conclude that Manso was lying to the Respondent when he reported that his car had overheated and that he was late for work because of car trouble. In light of this conclusion, I must further find that the Respondent discharged Michael Manso on August 17 for cause . . . ." *ABF Freight System, Inc.*, 304 N.L.R.B. at 600.



*Inc.*, 963 F.2d at 1109. Lying under oath to a judge is wrong, regardless of whether it involves facts that are "highly relevant" as opposed to facts that are merely "relevant" to the proceeding. As one court aptly pointed out, "[i]f truth is diluted, it is no longer truth." *Allis-Chalmers Mfg. Co. v. N.L.R.B.*, 261 F.2d 613, 616 (7th Cir. 1958). Neither a court nor the NLRB serves its own purposes by permitting some amount of lying, or by adopting a standard that allows some dishonesty depending on its degree of relevance. Thus, reinstatement should be denied to any employee, like Manso, who intentionally and demonstrably lies under oath to an NLRB judge during an administrative hearing concerning his employment.

Manso's pattern of dishonesty and untruthfulness is precisely the conduct courts have recognized as undermining the essential trust that is at the heart of the employer-employee relationship. Manso demonstrated disdain for his employer and his collectively-bargained grievance procedure by intentionally lying to both. He then lied under oath to the NLRB judge about a material fact related to his unfair labor practice charge. Although it would be naive to suggest that Manso is the first person to testify untruthfully in an administrative hearing, it is significant that Manso's overt contempt for the Board process and the Act it implements prompted the judge to take the uncommon step of stating in his written decision that Manso had lied. Under these circumstances, it would be impossible for ABF or any employer to accept an employee like Manso back into the workplace. It certainly does not effectuate the purposes or policies of the Act to require any employer to do so.

## II. THE NLRB'S REINSTATEMENT OF MANSO IS AN ABUSE OF ITS DISCRETION

Although the NLRB enjoys considerable latitude in determining whether an employee's reinstatement effectuates the purposes and policies of the Act, that discretion is not unlimited. In deciding whether to order reinstatement, the Board may not act arbitrarily, unreasonably or capriciously. *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). *See also N.L.R.B. v. Preterm, Inc.*, 784 F.2d 426 (1st Cir. 1986). The Board's choice here of where to draw the line between conduct that undermines both the Board's processes and the employer's workplace, and that which does not, was arbitrary and without any reasonable basis.

The NLRB apparently believes that a forfeiture of reinstatement is required only where the abuse of its processes has been "malicious." *See* Brief for the National Labor Relations Board in Opposition to Petition for Certiorari [NLRB Opposition] at 13. *See also Service Garage, Inc.*, 256 N.L.R.B. 931; *Owens Illinois, Inc.*, 290 N.L.R.B. 1193 (1988), *enforced without opinion*, 872 F.2d 413 (3d Cir. 1989). The Board claims that in analyzing the appropriateness of denying reinstatement, it examines, *inter alia*, (1) whether the administrative law judge credited the employee's testimony regarding the Act's alleged violation; (2) whether the employee's testimony was generally truthful; and (3) "whether the employer demonstrated that the employee was unfit for further employment." NLRB Opposition at 13.[5]

[5] The NLRB unfortunately did not apply this test to determine whether Manso's reinstatement was warranted. Had the Board done so, it would have found reinstatement inappropriate. First, as previously noted, the administrative law judge concluded that Manso's untruthful statements were the reason for his discharge. Moreover, although the judge may have credited Manso's testimony in other respects, it is apparent that the judge did not consider Manso to be a trustworthy witness. *ABF Freight System, Inc.*, 304 N.L.R.B. at 600. Finally, ABF demonstrated that Manso had lied on three occasions: to the company, to the grievance committee, and to the judge. Even assuming *arguendo* that Manso may have lied originally to protect his job, he certainly had no basis for lying to the judge given the Board's theory of the statutory violation. Manso's decision to compound his original lie on two occasions, especially before the Board, clearly demonstrates his lack of fitness for further employment.



Interestingly, the impact of requiring the reinstatement of a dishonest employee has not been completely lost on the NLRB. Indeed, the Board has recognized that the employer-employee relationship "requires mutual trust," and that disloyalty by an employee precludes reinstatement because it destroys that trust. *Studio S.J.T., Ltd.*, 277 N.L.R.B. 1189, 1201 (1985). *See also Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1629 (1956). The Board also has denied reinstatement in cases where employees have been untruthful on their resumes or applications for employment. *See, e.g., W. Kelly Gregory, Inc.*, 207 N.L.R.B. 654 (1973); *Southern Airways Co.*, 124 N.L.R.B. 749 (1959), *modified*, 290 F.2d 519 (5th Cir. 1961).

Although the Board on occasion has recognized the harmful effect dishonesty and disloyalty can have on the employer-employee relationship, it refuses to acknowledge that uncontroverted lying to one of its own judges is equally damaging to that relationship. *See Lear-Seigler Management Service Corp.*, 306 N.L.R.B. No. 84, slip op. at 5 n.6 (1992) (subornation of perjury alone insufficient to deny reinstatement to an

employee); *Service Garage, Inc.*, 256 N.L.R.B. at 935 (deliberate and willful lying insufficient to preclude reinstatement because conduct did not amount to "malicious abuse of the Board's processes"). Fortunately, most courts of appeals have not hesitated to confront the NLRB over its reinstatement standard.[6] *See, e.g., N.L.R.B. v. Mutual Maintenance Service Co.*, 632 F.2d 33 (7th Cir. 1980).

Under the Board's standard, lying to support an unfair labor practice charge, although not condoned, does not require a forfeiture of the reinstatement remedy. In essence, the Board is telling employees that some lying to its judges is permissible. Even in this case, where the untruthful testimony elicited an unsolicited conclusion by the judge that the employee had lied, the Board paid only passing lip service to Manso's untruthfulness, stating: "We, of course, do not suggest that giving dishonest excuses for lateness cannot be a legitimate ground for discharge or other disciplinary action." *ABF Freight System, Inc.*, 304 N.L.R.B. at 590 n.13. The Board gave no indication that it considered whether Manso's

[6] Indeed, federal appeals courts have regularly denied enforcement of Board reinstatement orders where there has been employee misconduct undermining the employer-employee relationship. *See, e.g., Holiday Inn of America of San Bernardino*, 212 N.L.R.B. 280 (1974), *enforcement denied in relevant part, N.L.R.B. v. Apico Inns of California, Inc.*, 512 F.2d 1171 (9th Cir. 1975) ("reprehensible" and "egregious" conduct, including lewdness toward co-employees and customers and sexual harassment of co-employees); *Breitling Bros. Construction Co.*, 153 N.L.R.B. 685 (1965), *remanded in relevant part*, 378 F.2d 663 (10th Cir. 1967) (theft); *R.C. Can Co.*, 144 N.L.R.B. 210 (1963), *enforcement denied in relevant part*, 340 F.2d 433 (5th Cir. 1965) (employee threatened company president with bodily harm).



reinstatement would affect the integrity of its own processes or the employment relationship. This Court should categorically refuse "to take the Board's processes as lightly as the Board apparently does." *Precision Window Mfg., Inc.*, 963 F.2d at 1110.

Moreover, the Board's reinstatement of Manso simply sends the wrong message to employees. It places the Board's imprimatur on dishonesty in the workplace. Rather than telling employees that they can lie about certain matters, but not others, the Board should be reinforcing the message that any lying and dishonesty before administrative tribunals will not be tolerated. Such conduct should be viewed as an independent wrong for which the employee must assume the consequences, *i.e.*, forfeiture of the reinstatement remedy. *Alumbaugh Coal Corp.*, 635 F.2d at 1385. *See also Mutual Maintenance Service Co.*, 632 F.2d at 39 (employee who engaged in scheme to illegally obtain employment benefits not eligible for reinstatement despite fact that employer was "aware of and even encouraged" fraudulent action). This approach comports with both the specific purpose and policy of the Act,[7] and also with "the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act . . . ." *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 42 (1987).

The Board's refusal to adopt the position that an employee forfeits reinstatement by purposefully and demonstrably testifying untruthfully is especially

[7] Section 1(a) of the Act states that in their relations with one another, employers, unions and employees have no right "to engage in acts or practices which jeopardize the public health, safety, or interest." 29 U.S.C. § 151(a).

troubling because the NLRB has alternative remedies it can use to cure statutory violations. The Board's order requiring ABF to cease and desist from the conduct which gave rise to these violations would remain in effect, separate and apart from a reinstatement order. The Board's requirement that ABF post a notice signed by one of its authorized representatives and acknowledging the employer's intent to comply with the statute also is an effective remedy, and prevents similar misconduct in the future. Finally, the NLRB could order backpay until, for example, the time that the employee abused the Board's processes. Accordingly, a directive from this Court to the Board finding reinstatement inappropriate in cases such as this one will not undermine the Board's ability to "effectuate the policies" of the Act nor allow the statutory violations which occurred here to go unremedied.

## CONCLUSION

The NLRB's reinstatement of Manso neither effectuates the policies of the NLRA nor comports with the realities of the workplace. The Board's reinstatement order demonstrates a lack of concern by the Board for its own processes and the employer-employee relationship. Manso has shown a pattern of dishonesty with his employer, the grievance committee and an NLRB judge. Manso's disdain for the truth requires that reinstatement be denied under the facts of this case. No employer should have to trust its future to an employee like Manso. Accordingly, this case should be remanded to the Court of Appeals with instructions to deny enforcement of that portion of the Board's order directing ABF to reinstate Michael Manso.



Respectfully submitted,

*Of Counsel:*
STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

E. CARL UEHLEIN, JR.*
JOSEPH E. SANTUCCI, JR.
JOHN F. RING
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
* *Counsel of Record for Amici Curiae*

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